NO. 43951-4

COURT OF APPEALS, DIVISION II
STATE OF WASHINGTON

STATE OF WASHINGTON, APPELLANT

v.

JEFFREY DEAN TUCHECK, RESPONDENT

Appeal from the Superior Court of Pierce County
The Honorable Beverly Grant

No. 11-1-01343-1

BRIEF OF APPELLANT

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Table of Authorities

State Cases

Federal and Other Jurisdiction

Rules and Regulations

Table of Contents

A. ASSIGNMENTS OF ERROR.

1. The trial court erred in making findings of fact numbers 4, 7, 8, 11, 12, 13, 14, 15, 16, 17, 18 and 19 because they are not supported by the record.

2. The trial court erred in interjecting its impressions as findings of fact in findings number 6, 7 and 9.

3. The trial court erred in making finding of fact number 10 in that the information contained in it was not new information that would pertain to the motion to dismiss.

4. The trial court erred in making conclusions of law I, II, and III because those conclusions are not complete or supported by the record.

5. The trial court erred when it found a ***Brady***[1] violation when it did not make the appropriate findings under the case law.

6. The trial court erred when it found that mismanagement had occurred under CrR 8.3 such that dismissal was required where the trial court based its ruling and findings on its own personal opinions.

[1] ***Brady v. Maryland***, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963)

7. The trial court erred when it found that mismanagement had occurred under CrR 8.3 such that dismissal was required where the trial court did not find actual prejudice.

8. The trial court erred when it dismissed defendant's case without considering other alternatives to dismissal and made finding of fact number 20 that dismissal was the only remedy.

9. The trial court erred when it dismissed defendant's case when it based its decision on untenable reasons.

B. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR.

1. Did the trial court err when it dismissed defendant's case when the decision was based on untenable reasons?

C. STATEMENT OF THE CASE.

On March 30, 2011, the State charged defendant, Jeffrey Tucheck, with unlawful possession of a controlled substance with intent to deliver, unlawful use of a building for drug purposes, unlawful use of drug paraphernalia, and unlawful possession of a controlled substance- forty grams or less of marihuana. RP 1-3. The State also charged a co-

defendant Lisa Balkwill.[2] RP 1-3. The charges stemmed from the execution of a search warrant on March 29, 2011. CP 4-5.

Trial commenced on February 2, 2012 in front of the Honorable Beverly G. Grant. RP 3, CP 12. The two defendants were tried together. RP 3. On February 7, 2012, a CrR 3.5 hearing was held during which Detective Ray Shaviri testified. RP 23. During the CrR 3.5 hearing Detective Shaviri testified that he arrived at the scene after the search warrant was served. RP 25. He was the case office and primary detective on the case but he was not part of the entry team. RP 25, 43. The trial court ruled the statements made by both defendants admissible. RP 56.

Detective Shaviri was also the first witness in front of the jury on February 9, 2012. RP 113. Again, the Detective testified that he was the case officer on this particular case. RP 117, 119. There were six people in the house when they served the warrant, including the defendant and co-defendant. RP 120. Defendant was the subject of investigation. RP 121. Detective Shaviri spoke with co-defendant Balkwill who said she lived in a room in the house and didn't know if they would find drugs in her room. RP 122. She also stated that a man was found in her room when the police arrived but that he was just visiting. RP 123. Balkwill said she didn't sell drugs but that she used meth. RP 124.

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[2] The State did not appeal the dismissal of co-defendant Balkwill's case.

Detective Shaviri also spoke with defendant. RP 124. Defendant lived in the room across from Balkwill. RP 124. He said he didn't sell drugs but gave away meth to friends who came to his house to party. RP 124. Defendant told the Detective that he would find a half ounce of meth in his bedroom closet and that he had a half ounce of meth delivered to his house every few days. RP 124. Detective Shaviri described the photographing process that occurs during a search. RP 127. He also indicated that he did not search the house. RP 132.

Deputy Shafer was the second witness. Deputy Shafer was part of the entry team for the search warrant. RP 209. Deputy Shafer found and cuffed defendant in the southeast bedroom. RP 211. Shafer also assisted in the search of the house. RP 212. He was assigned to search the bedroom where Balkwill had been found and detailed for the jury the items he had found in that room. RP 214-224. When he described a syringe found in the room, both defense attorneys objected because some of the items the Deputy described had not been booked into evidence. RP 227. Court then ended for the day and recessed for the weekend. RP 233.

On Monday, February 13, 2012, the State informed the court that after Deputy Shafer testified they discussed photos. RP 237. The State contacted the officers to get the photos, obtained the photos and also notified defense counsel. RP 237. Both defense counsels then moved for dismissal. RP 238, 239. CP 24-30. The trial court ruled that under ***Brady***, the late disclosure of the photographs meant the remedy would be

either a mistrial or dismissal but the trial court felt that the trial could not continue. RP 243.

During a recess, the State went over the police reports with a Deputy and informed the court that on page 39 and 40 of the .2 report there was a notation that said, "photos of items of evidence." RP 247. This piece of discovery was given to defendants on June 1, 2011. RP 248. After hearing more argument from all parties, the trial court again reiterated that ***Brady*** had not been upheld. RP 266. The evidence meant that the strategy of the defendants might have changed. RP 266. The trial court ruled that defendants did not receive notice of the photos, that they were prejudiced by the delay but then declared that mistrial was the remedy and not a dismissal. RP 267. Both defendants continued to move for dismissal. RP 268-271. The trial court then dismissed Balkwill's case but did not dismiss defendant's case. RP 271.

The next day, defendant and the State appeared in front of the court; Balkwill and her counsel did not since her case has been dismissed. RP 275. Defendant stated he was not asking for a mistrial but it was the understanding of the parties that the trial court had already declared a mistrial. RP 275. The trial court then brought the jury out, declared a mistrial in front of the jury and discharged the jury. RP 298. Defense counsel made a motion to withdraw based on his fee agreement and the trial court granted his motion to withdraw. RP 307. The trial court then dismissed defendant's case because it has dismissed the co-defendant's

case. RP 330. The trial court stated that while it had sua sponte declared a mistrial, it now felt that the case was right for dismissal. RP 333. The trial court stated that because it had dismissed the co-defendant and jeopardy had attached, it had to dismiss defendant's case. RP 337.

The State filed a motion to reconsider which was addressed on July 27, 2012. RP 343. The delay in addressing the motion appeared to be because of the trial court's surgery and then various continuances on the part of the parties. RP 345. The motion was further addressed on September 7, 2012 when all parties were present. RP 349. The trial court determined that the State's appropriate remedy was appeal and proceeded to the entry of the findings of facts and conclusions of law. RP 361.

On September 20, 2012, a motion and order of dismissal with prejudice was filed. CP 80-81. The State filed a notice of appeal on September 13, 2012. CP 78-79.

D. ARGUMENT.

1. THE TRIAL COURT ERRED IN DISMISSING DEFENDANT'S CASE AS IT BASED ITS DECISION ON UNTENABLE REASONS.

The defendant has a right to a fair trial, but that "right does not include a right to an error free trial." ***State v. Ciskie***, 110 Wn.2d 263, 283, 751 P.2d 1165 (1988). A new trial is necessitated only when the defendant "has been so prejudiced that nothing short of a new trial can insure that the defendant will be treated fairly." ***State v. Bourgeois***, 133

Wn.2d 389, 407, 945 P.2d 1120 (1997) (citing ***State v. Russell***, 125 Wn.2d 24, 85, 882 P.2d 747 (1994)); *see also* ***State v. Lemieux***, 75 Wn.2d 89, 91, 448 P.2d 943 (1968) ("Something more than a possibility of prejudice must be shown to warrant a new trial.")). Dismissal is an extraordinary remedy and its appropriateness is fact specific, to be determined on a case by case basis. *See* ***State v. Ramos***, 83 Wn. App. 622, 637, 922 P.2d 193 (1996), ***State v. Coleman***, 54 Wn. App. 742, 749, 775 P.2d 986 (1989). Dismissal is available as an option "only when there has been prejudice to the rights of the accused which materially affected the rights of the accused to a fair trial and that prejudice cannot be remedied by granting a new trial." ***State v. Baker***, 78 Wn.2d 327, 332-333, 474 P.2d 254 (1970); ***State v. Woods***, 143 Wn.2d 561, 582, 23 P.3d 1046 (2001); ***State v. Laureano***, 101 Wn.2d 745, 682 P.2d 889 (1984).

The trial court's power to deny a motion to dismiss is discretionary and is only reviewable for a manifest abuse of discretion. ***State v. Blackwell***, 120 Wn.2d 822, 830, 845 P.2d 1017 (1993). The trial court's decision should be reversed only if it was manifestly unreasonable, or based on untenable grounds, or made for untenable reasons. *Id.* "A decision is based on untenable grounds 'if it rests on facts unsupported in the record or was reached by applying the wrong legal standard.'" ***State v. Martinez***, 121 Wn. App. 21, 30, 86 P.3d 1210 (2004) (citing ***State v. Lewis***, 115 Wn.2d 294, 298-99, 797 P.2d 1141 (1990)).

In the instant case, the trial court dismissed defendant's case after erroneously finding that a ***Brady*** violation had occurred. The trial court also interjected its own personal opinions about the case into its decision, did not require defendant to show actual prejudice and did not explore lesser alternatives to dismissal.

a. The trial court erroneously determined that a ***Brady*** violation had occurred.

"[S]uppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution." ***Brady v. Maryland***, 373 U.S. 83, 87, 83 S. Ct. 1194, 10 L. Ed. 2d 215 (1963). *See* ***State v. Thomas***, 150 Wn.2d 821, 850, 83 P.3d 970 (2004). A challenge to a conviction based on an alleged ***Brady*** violation is reviewed de novo. ***U.S. v. Woodley***, 9 F.3d 774, 777 (9th Cir. 1993).

"There are three components to a ***Brady*** violation: (1) the evidence at issue must be favorable to the accused, either because it is exculpatory or impeaching; (2) the evidence must have been suppressed by the State, either willfully or inadvertently; and (3) the evidence must be material, meaning that the evidence must have resulted in prejudice to the accused." ***State v. Sublett***, 156 Wn. App. 160, 200, 231 P.3d 231, *review granted*, 170 Wn.2d 1016, 245 P.3d 775 (2010) (citing ***Strickler v.***

Greene, 527 U.S. 263, 281-82, 119 S. Ct. 1936, 144 L. Ed. 2d 286 (1999)); ***In Re Brennan***, 117 Wn. App. 797, 805, 72 P.3d 182 (2003).

"Prejudice occurs 'if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.'" ***Sublett***, 156 Wn. App. at 200; ***Brennan***, 117 Wn. App. at 805 (citing ***Matter of Personal Restraint of Benn***, 134 Wn.2d, 868, 916, 952 P.2d 116 (1998) (quoting ***U.S. v. Bagley***, 473 U.S. 667, 682, 105 S. Ct. 3375, 87 L. Ed. 2d 481 (1985)). "Prejudice is determined by analyzing the evidence withheld in light of the entire record." ***Sublett***, 156 Wn. App. at 200 (citing ***In re Pers. Restraint of Sherwood***, 118 Wn. App. 267, 270, 76 P.3d 269 (2003) (citing ***Benn v. Lambert***, 283 F.3d 1040, 1053 (9th Cir.), *cert denied*, 537 U.S. 942, 123 S. Ct. 341, 154 L. Ed. 2d 249 (2002))).

"Although the prosecution cannot avoid its obligations under ***Brady*** by keeping itself ignorant of matters known to other state agents, it has no duty to independently search for exculpatory evidence." ***Brennan***, 117 Wn. App. at 805. "'A ***Brady*** violation does not arise if the defendant, using reasonable diligence, could have obtained the information' at issue." ***Sublett***, 156 Wn. App. at 200 (citing ***Benn***, 134 Wn.2d at 916 (quoting ***Williams v. Scott***, 35 F.3d 159, 163 (5th Cir. 1994))); ***Thomas***, 150 Wn.2d at 851.

In the instant case, the State is not disputing that the pictures of the crime scene taken during the search were not timely disclosed to

defendant. However, the record does not support a finding that the pictures were favorable to defendant as either exculpatory or impeaching nor does it support that the information in the pictures prejudiced defendant. The trial court's findings and rulings are in error.

The trial court found that a ***Brady*** violation had occurred. RP 266. The trial court based this ruling on the fact that the pictures were discoverable and were turned over untimely. RP 266, CP 72-77, #13. However, the trial court never found that the pictures were favorable to defendant. In fact that trial court specifically stated "I don't know if some of those things are exculpatory or not. I haven't lived with the case as long as you have." RP 265. Defense counsel himself could not say that photos were exculpatory. Counsel stated that "this could be very exculpatory but also very damming." RP 240. There is no basis for the court's finding #13 that Detective Shavari did not turn over exculpatory evidence since so such finding was ever made. The first part of the ***Brady*** test was not satisfied.

Second, there is no support in the record for the finding that defendant was prejudiced by the information in the pictures. The pictures themselves were not made part of the record in the trial court. However, the State stated on the record that the pictures were documenting what the search looked like. RP 238. In ruling that a ***Brady*** violation had occurred, the trial court focused on the fact that defendant did not have the evidence in a timely matter and not on the content of the evidence. The trial court

expounded on its own experience as a litigator and how not having all the evidence can make it difficult to present a theme. RP 265. This is the only basis in the record that shows how the photographs hindered defendant's ability to prepare for trial and yet the trial court does not analyze how the photographs would have changed this trial for this defendant. RP 265-267. The findings of fact #11 and #18 are not supported by the record as the trial court did not articulate specific prejudice nor did it relate its comments to the case at bar. CP 72-77, #11 and #18. The court ruled, without explaining why, that because there were two co-defendants, the pictures changed the strategy of each case. RP 266. Without support from the record, the trial court made the finding that the pictures played a significant role in defendant's case. CP 72-77, #7. The trial court also made assumptions that perhaps the pictures could have lead to severance but that "you just don't know how it plays out." RP 266. The trial court found that there needed to be more time to absorb the evidence and the various theories. RP 267. This ruling is non specific and does not show how defendant was actually prejudiced.

Finally, defendant could have obtained these photos using reasonable diligence. Defendant received discovery on June 1, 2011 which was a police report that mentioned photos. RP 247-248. In addition, the State made it clear that Detective Shaviri had always been available for an interview. RP 144. The fact that defense counsel chose not interview the case officer or chose not to inquire about the nature of

the pictures is not an excuse. The fact that defense counsel knew of the existence of the photographs means a ***Brady*** violation did not occur.

The trial court found a ***Brady*** violation simply because evidence was disclosed after trial had commenced. However, the test for a ***Brady*** violation requires a finding that the evidence was favorable to defendant and that defendant was prejudiced. The trial court did not make those findings using any facts related to the case at bar or make any specific findings about the photographs themselves. The trial court did not properly apply the case law. The trial court erred in finding a ***Brady*** violation.

b. The trial court erroneously found that defendant had shown actual prejudice.

CrR 8.3(b) allows a judge to dismiss charges against a defendant only where arbitrary actions or governmental misconduct has prejudiced the rights of the defendant.

Before a court may dismiss a charge under CrR 8.3(b), two factors must be met. ***State v. Michielli***, 132 Wn.2d 229, 239, 937 P.2d 587 (1997). First, a defendant must show that the prosecutor acted arbitrarily or committed misconduct. *Id.* Prosecutorial mismanagement qualifies as governmental misconduct. ***State v. Blackwell***, 120 Wn.2d 822, 831, 845 P.2d 1017 (1993). Second, the defendant must prove that this action prejudiced his or her right to a fair trial. ***Michielli***, 132 Wn.2d at 240.

Prosecutorial misconduct or mismanagement does not warrant dismissal under this rule if it does not prejudice the defendant. ***State v. Teems***, 89 Wn. App. 385, 388, 948 P.2d 1336 (1997). Speculative prejudice is not a basis for dismissal under CrR 8.3, the defendant must show actual prejudice. ***State v. Rohrich***, 149 Wn.2d 647, 658, 71 P.3d 638 (2003), ***State v. Koerber***, 85 Wn. App. 1, 6, 931 P.2d 904 (1996), ***State v. Stein***, 140 Wn. App. 43, 56-57, 165 P.3d 16 (2007).

The trial court's findings that the State mismanaged the case are far more extensive then the record supports. The trial court's findings show that the trial court had a problem with Detective Shaviri. In the findings of fact #14, #15, #16, #17 and #19, the trial court paints Detective Shaviri out to be a rogue detective who did not comply with any of the court's directions and willfully withheld the pictures. However, the record only shows one objection to Detective Shaviri's testimony and that was in regard to his characterization of the defendants he deals with on a regular basis. RP 113-115. In fact, the Detective was so concerned about getting his testimony to comply with the court's orders that he was clear with the court during voir dire by defense counsel that his answer would open the door to an area he was not supposed to testify to and that he did not want to do that. RP 145-146. This shows the opposite of the trial court's finding. The Detective was the case officer on the case and was not part of the entry team that searched the house. RP 25, 43, 119, 132. The Detective also described the photographing process that occurs at the

scene. RP 127. The trial court again interjected its own personal opinions in the findings when it found that it is highly unlikely the Detective would have ever disclosed the pictures. CP 72-77, #19. The record supports an inference that any nondisclosure of the photographs was an accident and not a willful act on behalf of the Detective. He was not part of the search team so did not take the photos and willfully described for the jury the photographing process. The nondisclosure appears to be an oversight. The record does not support the findings that Detective Shaviri ignored court orders or failed to comply with the court rules. The trial court erred in making these unsupported findings.

The State did not disclose the pictures until after the case had started. That was a mistake. However, the findings as to the nature of how the photos came about are also unsupported. Despite the fact that the only evidence was that Deputy Shafer told the attorneys about the photos and that Detective Shaviri, the case officer, brought them to the State upon request, the trial court made the finding that Detective Shaviri knew about the photos, had custody of the photos and failed to provide them. RP 237, CP 70-72, #8 and #12. There is no evidence in the record to support this finding. Detective Shaviri was not brought back before the court, no information about his knowledge or lack of knowledge was ever discussed, no evidence supported that he withheld the photographs, and no documents were produced to support this finding. The record supports that the pictures were mentioned on page 39 and 40 of the .2 police report

and that the police report was sent over to defense counsel in discovery on June 1, 2011. RP 247-248. The photos were obtained after the parties spoke with Deputy Shafer after court and outside the presence of the jury. RP 237, 334.[3] While there was a delay in the disclosure of the photographs, defense received discovery that referenced the photos and the State provided them as soon as their existence was brought to her attention. The trial court's conclusion of law number 20 is incomplete in that does not explain the nature of the mismanagement or the extent. Any mismanagement was inadvertent and cured as soon as it was discovered.

The case law is clear that it is defendant's burden to show actual prejudice. Defendant cannot do so in this case. The photos were of the scene that had been searched. The parties were familiar that a search warrant had been issued and that the scene had been searched as that was the focus of the CrR 3.5 hearing and Detective Shaviri's testimony at trial. RP 25, 117, 120, 121. Further, Detective Shaviri described the photographing of the scene and it was made clear that he had been available to be interviewed. RP 127, 144. In the court's finding of fact #10, the court details that the photos showed items belonging to a man in the female co-defendant's room as well as an identification card belonging

[3] This part of the record conflicts with finding of fact #4. CP 72-77. The photographs were never mentioned during testimony. They were mentioned out of court in a conversation with Deputy Shaffer and the parties. This finding is not supported by the record.

to another person and that these supported potential defenses. CP 72-77, #10. However, this was not new information. A man was found in the female co-defendant's bedroom. RP 123. A man's belongings being found in that room is hardly surprising. Six people were found in the home so having another person's identification in the house is also not a surprise. RP 120. The fact that this finding is used to support the dismissal is incorrect as the information detailed was not new information.

The trial court also interjected its own assumptions and impressions as findings of fact. In findings of fact number 6 and 9, the trial court found that it was its impression that the parties believed that the photos pertained to the confidential informant. CP 72-77, #6 and #9. However, the parties did not even know of the photos until they talked to Deputy Shaffer. RP 237. The notation on the police report was found by the State in researching to see if the photos existed. RP 247. Co-defendant's counsel made a remark that the photos could have been related to the CI. RP 251. The trial court also found that its impression was all the parties viewed the photographs in the same way. CP 72-77, #7. The record only supports that the parties did not know of their existence until the second witness of the trial. The trial court's finding reinvents the record and the trial court's impressions are not fact.

Defendant's did not show actual prejudice from the photographs being disclosed late. As the photos related to the search warrant and the scene that was searched, the information was not new. The trial court's

conclusion of law that this evidence was critical and affected the defendant's due process rights is not supported given the discrepancies between the findings of fact and the record. CP 72-88, conclusion #II. The areas identified by the trial court as being items raised in the photos were already known to the parties as they were facts already in evidence. The fact that the photos were late would have necessitated a recess or brief continuance of the trial for the parties to review the photos, as will be discussed below. The mere fact that the photographs were discovered after trial had started does not establish prejudice. The trial court erred.

c. The trial court failed to consider alternatives to dismissal.

Discovery in criminal cases is governed by CrR 4.7. ***State v. Pawlyk***, 115 Wn.2d 457, 471, 800 P.2d 338 (1990). The appropriate remedy for a violation of CrR 4.7 where defense is surprised by evidence is a continuance so that defense can examine the evidence. ***State v. Hutchinson***, 135 Wn.2d 863, 881, 959 P.2d 1061 (1998), ***State v. Linden***, 89 Wn. App. 184, 195-196, 947 P.2d 1284 (1997, *review denied*, 136 Wn.2d 1018 (1998). "Where previously undisclosed discovery is revealed during the State's case-in-chief, a continuance can be an appropriate remedy." ***State v. Krenik***, 156 Wn. App. 314, 321, 231 P.3d 252 (2010) (citing ***State v. Brush***, 32 Wn. App. 445, 456, 648 P.2d 897 (1982)).

As noted above, dismissal is an extraordinary remedy that should only be used in the most extreme circumstance. In ***State v. Brooks***, 149 Wn. App 373, 386, 203 P.3d 397 (2009), the court upheld the dismissal of defendants' cases where the State failed to provide witness lists, police reports and repeatedly provided stacks of discovery on the morning of hearings which caused them to be continued. The State continually failed to meet its discovery obligations, including failing to deliver the police report of the lead detective, and was not timely in turning over evidence it had in its possession. *Id.* at 386 and 390. The court found that dismissal is appropriate only in extraordinary cases but found the case in front of it to be extraordinary. *Id.* at 393.

In ***Martinez***, the evidence showed that the State willfully withheld a report in hopes that one of their witnesses would testify differently and make the report not exculpatory in nature. 121 Wn. App. at 32. The State clearly willfully withheld exculpatory information. *Id.* at 32-33. The court of appeals found that dismissal was appropriate given the State's egregious actions. *Id.* at 23.

However, in ***Krenik***, the court found that a DEA surveillance tape that was not disclosed until the first day of trial did not warrant a mistrial. 156 Wn. App. at 321. A continuance to get the recording was an available remedy. *Id.*

The trial court erred when it found that the only remedy was dismissal. CP 72-77, #20 and conclusion III. First, the record does not

support this finding or conclusion. The trial court initially stated that it did not think that a dismissal was appropriate and that the court was considering declaring a mistrial. RP 267. Second, the trial court dismissed the case without proper analysis. The trial court, apparently because defense counsel opposed a mistrial, dismissed the co-defendant's case. RP 271. The trial court did not dismiss defendant's case immediately but did dismiss defendant's case the next day because it had dismissed the co-defendant's case. RP 330. The court never made a finding that this case was similar to ***Martinez*** or ***Brooks*** and never found that this was an extraordinary case that required dismissal. The trial court's reasons for dismissing defendant's case seem to be because it dismissed the co-defendant's case and the trial court dismissed the co-defendant's case because defense counsel wanted it. The proper record under case law was not made.

As dismissal is an extraordinary remedy, the trial court should have looked at other options. The trial was only in its second day and only one witness had finished testifying and the second witness was still in the middle of direct examination by the State. The trial court could have offered a recess for the parties to look at the photos and determine if other witnesses needed to be added or what objections needed to be made. Detective Shaviri could also have been recalled to discuss the photos. The fact that he has already testified did not prevent him from being called back. However, the trial court did not even consider a recess or a break to

review the photos and for the parties to regroup. The trial court immediately decided that the remedy would either be a mistrial or a dismissal. No record was made of how this case necessitated such an extreme remedy. The trial court erred in not considering other sanctions and dismissing defendant's case simply because it dismissed the co-defendant's case. This court should overturn the trial court's ruling and remand for a new trial.

E. CONCLUSION.

The trial court based its decision to dismiss defendant's case on untenable grounds, including incorrectly applying case law. The State respectfully requests that this court overturn the trial court's ruling dismissing this matter, reinstate defendant's case, and remand for a new trial.

DATED: February 6, 2013

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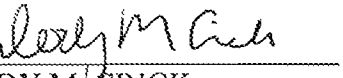

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